SUPREME

OCT 4 1974

MICHAEL RODAK, JR., CLERK

in the Supreme Court of the United States

OCTOBER TERM, 1974

MISC. NO. _____

LANCE SCHENKER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI PURSUANT TO 28 U.S.C. §1254(1)

DANIEL S. PEARSON
Pearson & Josefsberg, P.A.
Counsel for Petitioner
733 City National Bank Building
25 West Flagler Street
Miami, Florida 33130
Tel: 377-8155 (305)

MIAMI REVIEW — 371-4853 — 377-3721

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PETITION FOR WRIT OF CERTIORARI PURSUANT TO 28 U.S.C. §1254(1)

The Petitioner, LANCE SCHENKER, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on July 8, 1974.

OPINION BELOW

The opinion of the Court of Appeals, and its Order on a Petition for Rehearing, not yet reported, appear in the Appendix to this Petition.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on July 8, 1974. A timely Petition for Rehearing was filed, and that Petition was denied on September 5, 1974. This Petitiion has been filed within the time prescribed by the applicable statutes and rules. The Court's jurisdiction is invoked under Title 28 U.S.C. §1254(1).

QUESTION PRESENTED FOR REVIEW

DOES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT REQUIRE THAT A TRIAL JUDGE'S FINDING OF "NO BENEFIT" UNDER THE YOUTH CORRECTIONS ACT [18 U.S.C. §5010(d)] BE SUPPORTED BY SOME EVIDENCE TO JUSTIFY THAT FINDING?

CONSTITUTIONAL PROVISION INVOLVED

AMENDMENT V

No person shall . . . be deprived of life, liberty, or property, without due process of law.

STATUTORY PROVISION INVOLVED

TITLE 18 U.S.C. §5010(d)

> If the court shall find that the youth offender will not derive benefit from treatment under subsection (b) or (c), then the court may sentence the youth offender under any other applicable penalty provision.

STATEMENT OF THE CASE

Lance Schenker was twenty years old at the time he was indicted, pled guilty and was sentenced on a single charge of distributing L.S.D. in violation of Title 21 U.S.C. §841(a)(1) and Title 18 U.S.C. §2.

Schenker, a first offender, cooperated with the Government. At the sentencing hearing the prosecuting attorney recommended against incarceration (App. I, 17-18).[1] At that hearing, the Court had before it other evidence which attested to Schenker's good character and developing maturity. That evidence included letters from a Virgin Islands Municipal Probation Officer, the family minister and the boy's employer. (Supp. R). Nothing in the record contradicted the evidence submitted on Schenker's behalf.

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[1]This case was before the Court of Appeals on two occasions. The designation "App. I" refers to the appendix prepared on the first appeal, and "App. II" refers to the appendix in the second appeal. The designation "Supp. R" reflects a pre-sentence investigation report which, although disclosed to Schenker's counsel, was sealed at the time of the first appeal.

Nevertheless, the trial court sentenced Schenker to three years imprisonment. Pursuant to the split sentence provisions of Title 18 U.S.C. §3651, he was ordered confined for six months and placed on probation for two and a half years (App. I, 1-3).

Schenker's counsel filed a Motion for Relief Under Rule 35, Federal Rules of Criminal Procedure, and sought the benefit of the Youth Corrections Act for his client.[2] The motion was denied without comment. The Fifth Circuit vacated the sentence and remanded the case to the District Court for resentencing "with appropriate findings under 18 U.S.C. §5010(d)." *United States v. Schenker*, 486 F.2d 319 (5th Cir. 1973).

Schenker and his counsel appeared before the trial court for resentencing. New letters of support for Schenker's character were submitted. (App. II, 2-9). Despite a record that provided no reasons to reject the Youth Corrections Act, the District Court reimposed its original sentence and stated, "the Court makes an express finding that Lance Schenker would not derive benefit from treatment under the Youth Corrections Act . . ." (App. II, 31-32). No reasons were stated.

The trial judge's comments made it clear that he viewed the finding requirement a mere matter of form and not one which required evidentiary support. He said,

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[2]Although Schenker had completed the confinement portion of his adult prison sentence at that time, Youth Corrections Act sentencing would have permitted eventual expungement of his conviction, Title 18 U.S.C. §5021. That is an important benefit of the Act. *Cunningham v. United States*, 256 F.2d 467, 472 (5th Cir. 1938); *Tatum v. United States*, 310 F.2d 854 (D.C. Cir. 1962). Without it, Schenker is forever burdened with a criminal record.

"I don't know why the Court of Appeals gets so obsessed with form . . ." (App. II, 25).

Schenker then perfected his second appeal. He complained of the failure of the trial court to state reasons, *and* of the lack of evidence to support the findings. The Fifth Circuit, in an order dated July 8, 1974, affirmed the sentence without comment, citing only *Dover v. United States*, 489 F.2d 688 (5th Cir. 1974).

A Petition for Rehearing was filed. It suggested that the Court of Appeals failed to address the lack of evidence issue—a due process question. In addition, the Petition pointed out that if affirmance was proper at all, the Court should have relied upon *Dorszynski v. United States*, ___ U.S. ___, 94 S.Ct. 3042, 41 L.Ed.2d 855 (June 26, 1974). The Petition for Rehearing was denied, the Court adding, "See *Dorszynski v. United States*, ___ U.S. ___ (1974)".

This Petition for Writ of Certiorari followed.

REASONS FOR GRANTING THE WRIT

THIS CASE PRESENTS AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW WHICH HAS NOT BEEN RESOLVED BY THIS COURT.

In *Dorszynski v. United States*, ___ U.S. ___, 94 S.Ct. 3042, 41 L.Ed.2d 855 (June 26, 1974), the Court granted certiorari to resolve a conflict over whether the Youth Corrections Act required a sentencing court to make an explicit finding that an offender would not benefit from

treatment under the Act, or whether such a finding could be implied from the record. The Court concluded that "an express finding of no benefit must be made on the record, [but] the Act does not require that it be accompanied by supporting reasons." *Id.* 94 S.Ct. at 3044. Four Justices would have required a statement of reasons. *Id.* 94 S.Ct. at 3053.

Dorszynski did not resolve the question posed by this Petition. Here the question is: May the express finding of "no benefit" be made when the record is absolutely devoid of evidence to support the finding? Indeed, may the finding of "no benefit" be made when the only evidence supports the contrary conclusion: that is, that the Defendant *would* benefit? Those queries pose issues of constitutional dimension.[3]

The majority's conclusion in *Dorszynski* was:

> "Literal compliance with the Act can be satisfied by an expression that makes clear the sentencing judge considered the alternative of sentencing under the Act and *decided* that the youth offender would not derive benefit from treatment under the Act."

Id. 94 S.Ct. at 3053 (Emphasis supplied.)

Decisions are based on facts. Due process means that a judicial "decision" or "finding" must be based on evi-

[3]In *Dorszynski*, the petitioner belatedly attempted to raise a due process claim merely as an adjunct to his statutory construction argument. His tardiness foreclosed review of that contention. *Id.* 94 S.Ct. at 3047, n. 7. The due process claim raised here is both different and preserved.

dence to support it. *Schware v. Board of Bar Examiners*, 353 U.S. 232, 246-247 (1957); *Thompson v. Louisville*, 362 U.S. 199, 206 (1960). The finding of "no benefit" in this case has no evidentiary support. As the undisputed record reflects, the evidence only bespeaks benefit.

While the majority opinion in *Dorszynski* made it clear that an explicit consideration and rejection of Youth Corrections Act treatment foreclosed appellate review, this case is more akin to *Yates v. United States*, 356 U.S. 363, 366-367, for the trial court utterly failed to exercise its discretion in light of the facts. Thus, review is appropriate. Because the issue is one of constitutional dimension, this Court should consider it, lest the impression be left that *Dorszynski* condones ritualism.

CONCLUSION

For the foreging reasons, it is respectfully submitted that the Petition for Writ of Certiorari be granted.

PEARSON & JOSEFSBERG, P.A.
Counsel for Petitioner
733 City National Bank Building
25 West Flagler Street
Miami, Florida 33130
Tel: 377-8155 (305)

By: _____
DANIEL S. PEARSON

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Petition for Writ of Certiorari were mailed to Robert H. Bork, Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, this ___ day of _____, 1974.

_____

DANIEL S. PEARSON

APPENDIX

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 73-2601
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

LANCE SCHENKER, a/k/a LANCE SHENKER,
Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Florida

(November 6, 1973)

Before GEWIN, COLEMAN and MORGAN,
Circuit Judges.

PER CURIAM: Lance Schenker appeals solely on the ground that he was improperly sentenced under the Youth Corrections Act, 18 U.S.C., § 5010 et seq. He complains that he was sentenced as an adult in the absence of an express finding by the trial court that he would not derive

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*Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

benefit from treatment, 18 U.S.C., § 5010 (d). The Government argues that such a finding is implicit in the sentence.

This is a dispute which can quickly be resolved by the District Court.

We vacate the sentence and remand to the District Court, where the appellant may be resentenced on his plea of guilty, according to law, and with appropriate findings under 18 U.S.C. § 5010(d).

VACATED and REMANDED.

App. 3

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74-1248
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

LANCE SCHENKER, a/k/a LANCE SHENKER,
Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Florida

(July 8, 1974)

Before GEWIN, GODBOLD and CLARK,
Circuit Judges.

PER CURIAM:

AFFIRMED. See Local Rule 21.[1] *See* United States v. Dover, 489 F.2d 688 (5th Cir. 1974).

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*Rule 18, 5 Cir. Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

[1]See NLRB v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

[TITLE OMITTED]

[Filed September 4, 1974]

ON PETITION FOR REHEARING
(September 5, 1974)

Before GEWIN, GODBOLD and CLARK,
Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED. See Dorszynski v. United States, ____ U.S. ____ (1947) (No. 73-4284, June 26, 1974, 42 L.W. 5156).